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No. - .

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

RICHARD REPOZA,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Questions Presented.

I. Whether the Supreme Judicial Court's failure to apply a harmless error analysis to this case solely because the defendant did not affirmatively concede the issue of intent conflicts with this Court's decision in *Rose* v. *Clark* and the decisions of lower federal and state courts following *Rose*.

II. Whether the Supreme Judicial Court misinterpreted *Francis* v. *Franklin* and established a new standard of review for jury instructions at odds with this Court's previous rulings.

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In the
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COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

RICHARD REPOZA,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Opinion Below.

The opinion of the court below is reported at 400 Mass. 516, 510 N.E.2d 755 (1987), which is reproduced here as Appendix A, page 1a.

Jurisdiction.

The decision of the court below was entered on July 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision Involved.

FOURTEENTH AMENDMENT.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

On July 3, 1978, Respondent Richard Repoza ("Repoza") was indicted by a Middlesex County Grand Jury in the Commonwealth of Massachusetts for murder in the first degree.

After trial by jury, Repoza was found guilty of murder in the second degree and sentenced to life imprisonment. On direct appeal, the Massachusetts Supreme Judicial Court affirmed the conviction, holding in part that allegedly burden-shifting language in the trial judge's instructions to the jury were vitiated by other, correct language in the charge. *Com-*

monwealth v. *Repoza* (*Repoza I*), 382 Mass. 119, 414 N.E.2d 591 (1980) (Appendix B, 9a).

Repoza filed a motion for new trial on August 17, 1984. The motion was denied by a Justice of the Superior Court on September 17, 1984. Repoza appealed the denial of his motion to the Massachusetts Appeals Court which affirmed the order of the Superior Court on July 14, 1986. The Supreme Judicial Court granted Repoza's application for further appellate review and, on July 23, 1987, reversed the order of the Superior Court and granted Repoza a new trial, holding that this Court's opinion in *Francis* v. *Franklin*, 471 U.S. 307 (1985) required that result. *Commonwealth* v. *Repoza* (*Repoza II*), 400 Mass. 516, 510 N.E.2d 755 (1987).

Statement of Facts.

The facts surrounding the homicide for which the respondent was indicted are set out in the opinion of the Supreme Judicial Court in *Repoza I* (Appendix B, 9a-26a). The Commonwealth of Massachusetts ("the Commonwealth") will limit its reiteration to the facts concerning Repoza's trial.

At trial, Repoza claimed that the Commonwealth had accused the wrong person. His trial attorney cross-examined the Commonwealth's witnesses to expose any inconsistencies and, in addition, called several witnesses who claimed that they saw a person other than Repoza with a knife but that they had not seen Repoza with a knife.

In line with Repoza's decision to cast suspicion on others and to deny either having a knife or being present at the scene of the stabbing, defense counsel stated in his opening remarks to the jury:

> [A] young boy was killed, and everyone is sorry for that . . . The defense [will] prove to you that not

> only could it not have been Repoza, that it was almost an impossibility it was him.

In closing argument, defense counsel stated to like effect:

> There is no way that Richard Repoza could have been at the spot where John Grogan became a victim . . . No. Repoza wasn't there. He wasn't at that spot at that time.

In his instructions to the jury, the trial judge twice stated malice could be presumed from the intentional use of a deadly weapon in a homicide.

Although the Assistant District Attorney tried to convince the judge to correct the charge by substituting the term "inference" for "presumption", the trial judge declined to do so. The defendant's attorney agreed with the judge's description of the law (*Repoza I*, Appendix B, 25a).

Of the conflicting versions of the events described by the witnesses for the prosecution and Repoza, the jury chose to believe that Repoza was the individual responsible for the victim's death, and returned a verdict finding Repoza guilty of murder in the second degree.

Argument.

I. THE FAILURE OF THE SUPREME JUDICIAL COURT TO APPLY A HARMLESS ERROR ANALYSIS TO THIS CASE SOLELY BECAUSE THE DEFENDANT DID NOT AFFIRMATIVELY CONCEDE THE ISSUE OF INTENT CONFLICTS WITH THE DECISION OF THIS COURT IN *Rose* V. *Clark* AND THE DECISIONS OF LOWER FEDERAL AND STATE COURTS FOLLOWING *Rose*.

The decision of the Supreme Judicial Court contained the following language:

> [U]nder our statute there is always an element of intent for the jury to determine in murder cases in which the defendant does not concede that a conviction of murder in the first or second degree would be warranted if the proper person were prosecuted. . . . At no point at either the trial or the direct appeal did the defendant concede that a murder, and not a manslaughter, had occurred. Thus, intent was a live issue and the error cannot be considered to be harmless beyond a reasonable doubt.

Commonwealth v. *Repoza*, 400 Mass. 516, 522 n.7, 510 N.E.2d 755, 758 n.7 (1987) (citations omitted) (Appendix A, 7a). Having stated this principle, the Supreme Judicial Court concluded that the rule in *Francis* v. *Franklin*, 471 U.S. 307 (1985) required the reversal of Repoza's conviction.

The barrier to harmless error analysis put in place by the Supreme Judicial Court is essentially identical to that imposed by the Sixth Circuit Court of Appeals in *Engle* v. *Koehler*, 707 F.2d 241 (6th Cir. 1983), *aff'd*, 466 U.S. 1 (1984) (per curiam) and applied in *Clark* v. *Rose*, 611 F. Supp. 294 (D. Tenn. 1983), *aff'd*, 762 F.2d 1006 (6th Cir. 1985), *reversed*, 106 S.Ct. 3101 (1986).

In *Engle*, the Court of Appeals stated:

> If the defendant acknowledges that an intentional, malicious killing occurred and only claims non-participation, then a *Sandstrom* instruction may be harmless. Conversely, if the defendant asserts lack of *mens rea*, a *Sandstrom* instruction can be extremely prejudicial even if overall proof of intent or malice is substantial.

Engle v. *Koehler*, 707 F.2d at 246.

This test was rejected in *Rose* v. *Clark*, 106 S.Ct. 3101 (1986) which was decided a full year before the opinion of the Supreme Judicial Court in this case. In *Rose*, this Court stated, "our harmless error cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that '*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.'" *Id.* at 3109 (citations omitted).

By holding that a *Sandstrom* error cannot be considered harmless unless a defendant in a murder case affirmatively concedes intent as an issue, the Supreme Judicial Court is in direct conflict with this Court and lower courts which have decided similar cases in the wake of *Rose* v. *Clark*, 106 S.Ct. 3101 (1986). See, e.g., *Matarese* v. *Le Fevre*, 801 F.2d 98 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1353 (1987)); *Bates* v. *Blackburn*, 805 F.2d 569 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 3190 (1987); *Merlo* v. *Bolden*, 801 F.2d 252 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1358 (1987); *Herd* v. *Kincheloe*, 800 F.2d 1526 (9th Cir. 1986); *McKenzie* v. *Risley*, 801 F.2d 1519 (9th Cir. 1986); *Myrick* v. *Maschner*, 799 F.2d 642 (10th Cir. 1986); *Potts* v. *Kemp*, 814 F.2d 1512 (11th Cir. 1987); *State* v. *Perez*, 10 Conn. App. 279, 523 A.2d 508, *cert. denied*, 203 Conn. 810, 525 A.2d 524 (1987).

The failure of the Supreme Judicial Court to consider this case in light of the rule in *Rose* v. *Clark*, 106 S.Ct. 3101 (1986) is particularly noteworthy because Repoza never contested the issue of intent at trial. Rather, he claimed that someone other than he was responsible for the crime. At trial, the opening statement of defense counsel, his cross-examination of the Commonwealth's witnesses, the testimony of Repoza's witnesses and counsel's closing argument all were directed toward the alleged misidentification of Repoza. Throughout the trial, the defense pressed its contention that Repoza had no knife, could not have been carrying one, and was not near the victim at anytime.

No argument was made that Repoza was acting in self-defense or in the heat of passion. No instruction on self-defense was requested or given. Rather, counsel for Repoza argued for outright acquittal.[1] The facts of the case are in stark contrast to those in *Rose* v. *Clark*, 106 S.Ct. 3101 (1986), where the defendant, who could not seriously contest identification, alleged amnesia, drunkenness and insanity as factors negating criminal responsibility. The Supreme Judicial Court's decision is in confict both with this Court's decison and decisions of lower federal and state courts. The Commonwealth of Massachusetts is entitled to a review of this case which will consist of an examination of "the entire record to determine whether the instruction which theoretically *could* have altered the verdict of the jury actually had such effect as a practical reality." *Myrick* v. *Maschner*, 799 F.2d 642, 645 (10th Cir. 1986) (emphasis in original).

II. The Supreme Judicial Court Misinterpreted *Francis* v. *Franklin* by Holding That *Francis* Established a Stricter Standard of Review Than That Set Forth in *Cupp* v. *Naughton* and *Sandstrom* v. *Montana*.

In *Commonwealth* v. *Repoza* (*Repoza II*), 400 Mass. 516, 510 N.E.2d 755 (1987), the Supreme Judicial Court of Massachusetts held that a judge's charge on malice in a murder indictment impermissibly shifted the burden of negating that element to the defendant, thereby violating *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). However, in *Commonwealth* v. *Repoza* (*Repoza I*), 382 Mass. 199, 414 N.E.2d 591 (1980),

[1] On direct appeal, Repoza did not raise the issue of a *Sandstrom* error in the charge. Rather, the Supreme Judicial Court reviewed the issue on its own intitative. *Commonwealth* v. *Repoza* (*Repoza I*), 382 Mass. 119, 494 N.E.2d 591 (1980) (Appendix B, 22a).

the Supreme Judicial Court concluded that the same instructions passed constitutional muster because, "the judge's erroneous equating of malice implied or inferred to malice presumed was ultimately vitiated by his repeated and careful instructions reinforcing the principle that the burden of proof on every essential element of the crime invariably remains with the Commonwealth." *Repoza I*, 382 Mass. at 134, 414 N.E.2d at 600. The Supreme Judicial Court added that "the instructions on the nature of malice aforethought, which came after the judge's erroneous use of the word 'presumption,' were sufficient to dispel any misconception that might have been created by the error." *Id.* In reaching this conclusion in *Repoza I*, the Supreme Judicial Court followed the admonition of *Sandstrom* v. *Montana*, 442 U.S. 510, 514 (1979) that the question in such cases is whether the charge, "read as a whole, makes clear the Commonwealth's burden." *Commonwealth* v. *Repoza* (*Repoza I*), 382 Mass. at 134, 414 N.E.2d at 600.

The sole intervening circumstance which can explain the opposite conclusions of *Repoza I* and *Repoza II* is the opinion of this Court in *Francis* v. *Franklin*, 471 U.S. 307 (1985). In *Repoza II*, the Supreme Judicial Court interpreted *Francis* v. *Franklin*, as holding that whenever a trial court introduces the concept of "presumption" into its instructions, other language in the charge must not only contradict the incorrect language but, through explanation, harmonize it with the entire charge as well. The Supreme Judicial Court stated, "*Francis* contemplates close scrutiny to determine whether language in the instructions not only corrects the erroneous language but also explains it." *Commonwealth* v. *Repoza*, 400 Mass. 516, 520, N.E.2d 755, 757 (1987) (App. A, 5a).

When viewed in the context of the instructions actually given in this case, it is apparent that the Supreme Judicial Court reads *Francis* as requiring the equivalent of an explicit explanation or definition of the word "presumption" as meaning

"permissive inference" in order to allow the jury instructions to pass constitutional muster. *Francis* contains no such requirement. Rather, as stated in *California* v. *Brown,* 107 S.Ct. 837, 839 (1987):

> "The question . . . is . . . what a reasonable juror could have understood the charge as meaning." . . . To determine how a reasonable juror could interpret an instruction, we "must focus initially on the specific language challenged." . . . If the specific instruction fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law.

Id., quoting Francis v. *Franklin,* 407 U.S. 307, 315-316 (1985).

Here, while the instructions given at the respondent's trial contain language concerning a "presumption" of malice arising out of the intentional use of a dangerous weapon, and while nowhere is there a specific "explanation" that only a permissive inference may be drawn from such evidence, no reasonable juror could have *applied* the instructions given as shifting the burden of proof to Repoza or as relieving the Commonwealth of its burden of proof. Because it is impossible to *apply* the instructions in a manner which shifts the burden of proof to Repoza, it is irrelevant that the term "presumption" is not specifically explained.

At Repoza's trial, the judge instructed the jury on the concept of malice as follows:

> "So what is malice as used in the words: malice aforethought? Well, it is of two kinds. It is active malice, which we all understand by the simple use of the words in this meaning: an active malice is ill

will towards someone. It is the active hatred of someone. It is a grudge or an ill feeling toward someone, harboring an attempt to hurt someone, or act of bad blood or feeling, generating motives of revenge or punishment. That is active malice. But you are not looking for active malice alone. You are looking for an unlawful, unjustified act with no extenuating circumstances, and the wrongfulness of the act itself is sufficient to sustain a finding of malice so far as the law is concerned.

"That is perhaps malice implied in law as distinct from malice that you find from the conduct of people. And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought. Because, as that term has long been understood and applied in this Commonwealth, the use of a deadly weapon, itself capable of causing harm and death, if an unjustified act with no extenuation or excuse, is sufficient itself to supply the element of malice you are looking for in determining whether a crime is murder or less than murder.

"However, the circumstances which attend to killing may be shown to rebut the presumption by showing circumstances which, although they do not excuse the killing, might mitigate it from the crime of murder to manslaughter. And this I will discuss for you when I define manslaughter."

Repoza I, 382 Mass. at 132 n.7, 414 N.E.2d at 599 n.7 (App. B, 22a).

As promised, the judge discussed mitigation which could reduce murder to manslaughter in the following terms:

> The Court has recently said that voluntary manslaughter was a killing from a sudden transport of

passion or heat of blood upon reasonable provocation without malice or upon sudden combat. Sudden combat is readily understood to be one of the events which may provoke one to kill without malice.

The Commonwealth must prove beyond a reasonable doubt every element of the crime charged, and the Commonwealth is bound to negate mitigating factors such as provocation.

Our Court has said that proof that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent that may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide.

So that I would like to say again that if the Commonwealth fails to prove absence of heat of passion on sudden provocation, but has nevertheless proved that the killing is unjustified, then you can bring in manslaughter. But if they have proved all the elements beyond a reasonable doubt, then you will bring in your verdicts as I have given them to you: first degree murder, or second-degree murder, or manslaughter.[12]

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[2] This instruction must be read in light of the law of second degree murder in Massachusetts. In Massachusetts, second degree murder can be established by proof that the defendant intended to kill *or* that he intended to inflict grave bodily harm, but not death. *Commonwealth* v. *Dunton*, 397 Mass. 101, 489 N.E.2d 1012 (1986); *Commonwealth* v. *Puleio*, 394 Mass. 101, 107-09, 74 N.E.2d 1078 (1985). In *Commonwealth* v. *Huot*, 380 Mass. 403, 408, 403 N.E.2d 411 (1980) the Supreme Judicial Court stated:

> In Massachusetts, malice, rather than a design to effect death, is the requisite mental element. Unlike the requirements of some other states, murder may be found in Massachusetts where there is no actual intent to kill. *Commonwealth* v. *Chance*, 174 Mass. 251-253 (1899). Malice aforethought includes any unexcused intent to kill, to do grievous bodily harm, or to do an act creating a plain and strong likelihood that death or grievous harm will follow.

Thus, it can be seen that in order to be satisfied that "malice" had been established, the jury had to find the following predicate facts:

(1) use of a deadly weapon, itself capable of causing harm and death;

(2) in a manner unjustified; and

(3) in a manner with no extenuation or excuse.

Malice was described as a finding dependent on the establishment of "an unlawful, unjustified act with no extenuating circumstances." *Repoza I*, 382 Mass. at 132 n.7, 414 N.E.2d at 599 n.7, (App B, 22a). The jurors were told that the Commonwealth had the obligation, "to negate mitigating circumstances such as provocation," and to prove "the absence of heat of passion or sudden provocation." Any reasonable juror hearing this instruction could only conclude that the Commonwealth had to prove more than the mere intentional use of a deadly weapon to carry its burden of proof.

A "presumption of malice" arising from the intentional use of a deadly weapon is of no unwarranted aid to the prosecution or detriment to the defendant if it is limited to intentional uses which are unjustified (i.e., not in self-defense) and undertaken without extenuation or excuse (i.e., where there is proof negating heat of passion or provocation). Whether or not the term "presumption" is explicitly "explained" matters little if a jury, applying instructions as an equation, cannot come to the conclusion that the defendant is required to rebut the "presumption" or that the "presumption" relieves the prosecution of its obligation to prove each element of the offense by affirmative evidence. By requiring "explanation", without consideration of what understanding a jury would have of the instruction as a whole, the Supreme Judicial Court has undertaken to expand the holding in *Francis* v. *Franklin*, 471 U.S. 307 (1985) in an unwarranted direction.

The opinion of the Supreme Judicial Court seems to be based on the portion of *Francis* which states that, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis* v. *Franklin*, 471 U.S. at 322. This language merely makes clear the holding in *Sandstrom* that general instructions on the presumption of innocence and burden of proof will not suffice to cure an instruction which appears to place the burden of proof to negate an element of an offense on a defendant or which relieves the Commonwealth of its burden. *Sandstrom* v. *Montana*, 422 U.S. at 526. Here, since there is no reasonable likelihood that a jury understood the instruction in an unconstitutional manner, there was no necessity of further explanation. *Francis* v. *Franklin*, 471 U.S. at 322-323 n.8.

The opinion of the Supreme Judicial Court thus transforms the holding in *Francis* from a reaffirmation of the principles of *Sandstrom* into a mechanistic test, thus creating the danger that instructions which can only be applied in a constitutional manner will be held constitutionally deficient. Such a result could not have been intended by this Court.

Conclusion.

For the reasons stated above, the petition for writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be granted.

Respectfully submitted,

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COMMONWEALTH *vs.* RICHARD REPOZA.

Middlesex. March 2, 1987. — July 23, 1987.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, NOLAN, LYNCH, & O'CONNOR, JJ.

Practice, Criminal, Instructions to jury, Presumptions and burden of proof, Retroactivity of judicial holding. *Due Process of Law,* Presumption. *Error,* Harmless. *Homicide. Malice. Intent.*

Discussion of the principles stated in *Francis* v. *Franklin,* 471 U.S. 307 (1985), as they elucidate the holding of *Sandstrom* v. *Montana,* 442 U.S. 510 (1979), with respect to an apellate court's assessment of the possible impact of constitutionally erroneous jury instructions in a criminal case. [517-520]

The holding of *Francis* v. *Franklin,* 471 U.S. 307 (1985), concerning impermissible burden-shifting language in instructions to a jury, was fully retroactive to a murder case tried in the Commonwealth in 1978. [520]

Discussion of the standards of review in a criminal case where the defendant made no objection to burden-shifting language in jury instructions. [520]

Certain jury instructions, given in 1978 at a murder trial, that created a presumption unconstitutionally shifting the burden of proof on the issue of malice, did not meet the requirements set forth in *Francis* v. *Franklin,* 471 U.S. 307 (1985), where no other language in the charge explained the improper instructions sufficiently to ensure that a juror did not misunderstand the instructions or view them as burden-shifting. [521-522]

A new trial was required in a murder case where error in the judge's instructions on malice was not harmless and where the defendant's intent was in issue. [522] NOLAN, J., dissenting.

INDICTMENT found and returned in the Superior Court Department on July 11, 1978.

A motion for postconviction relief, filed on August 17, 1984, was heard by *Hiller B. Zobel,* J.

After review by the Appeals Court the Supreme Judicial Court granted leave to obtain further appellate review.

The case was submitted on briefs.

Richard Repoza, pro se.

Scott Harshbarger, District Attorney, & *Fern L. Nesson*, Assistant District Attorney, for the Commonwealth.

ABRAMS, J. The question is whether *Francis* v. *Franklin*, 471 U.S. 307 (1985), requires us to grant the defendant's request for postconviction relief, Mass. R. Crim. P. 30 (a), 378 Mass. 800 (1978), following the affirmance of his conviction of murder in the second degree. See *Commonwealth* v. *Repoza*, 382 Mass. 119 (1980) (*Repoza I*). We conclude that the judge's charge impermissibly shifted the burden of proof to the defendant contrary to principles stated in *Francis* and that a new trial is required.

In 1978, a jury found the defendant guilty of murder in the second degree on an indictment charging him with murder in the first degree. We affirmed the conviction on direct appeal. See *Repoza I*, *supra*. In 1985, the defendant, with the aid of counsel, appealed from the earlier denial of a motion for postconviction relief. In his brief on appeal, he argued that the jury instructions, parts of which were erroneous because they created impermissible mandatory presumptions, failed to explain the erroneous language sufficiently, thereby violating the requirements of *Francis* v. *Franklin*, *supra*. The Appeals Court issued an order affirming the decision denying relief.[1] 22 Mass. App. Ct. 1110 (1986). We granted the defendant's application for further appellate review.

1. *Francis v. Franklin*. The question is the effect of *Francis*, *supra*, on the erroneous instructions discussed in *Repoza I*, but an understanding of *Francis* requires a brief discussion of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

In *Sandstrom*, the Supreme Court of the United States held that the instruction "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," *Sandstrom*, *supra* at 513, violates the Fourteenth Amendment's require-

[1] On direct appeal, we had considered the burden-shifting instructions pursuant to G. L. c. 278, § 33E. Thus, the Appeals Court correctly reasoned, in an unpublished memorandum, that the issue was one more properly reserved for consideration by this court. See *Commonwealth* v. *Carballo*, 381 Mass. 227 (1980); *Commonwealth* v. *Riva*, 18 Mass. App. Ct. 713, 719 (1984).

ment that the State prove every element of a criminal offense beyond a reasonable doubt. The Court explained that "[u]pon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of defendant's action), Sandstrom's jurors could reasonably have concluded that they were directed to find against defendant on the element of intent. The State was thus not forced to prove 'beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged,' [*In re Winship*, 397 U.S. 358, 364 (1970)], and defendant was deprived of his constitutional rights as explicated in *Winship*." *Id.* at 523. The Court stated that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Id.* at 514. The Court reversed the defendant's conviction, declaring that a reasonable juror could have interpreted the instruction as establishing either a conclusive or a rebuttable presumption. Either interpretation, the Court determined, would violate due process because a reasonable juror could have interpreted the instruction as relieving the government of its burden of proof and as shifting the burden of proof to the defendant to disprove malice. The Court in *Sandstrom* did not focus its attention on whether and how language which impermissibly shifts the burden of proof may be cured by other language in the charge.[2]

In *Francis, supra*, the Court turned its attention to that very issue to clarify the effect of *Sandstrom*.[3] *Francis, supra* at

[2] The *Sandstrom* Court stated in a footnote that "[t]he potential for these [impermissible] interpretations of the presumption was not removed by the other instructions given at the trial. It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. . . . But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." *Sandstrom, supra* at 518-519 n.7.

[3] The *Francis* decision, *supra* at 317, explicitly states that both conclusive and rebuttable presumptions relieve the State of its affirmative burden of proof.

309, specifically concerns the limited category of criminal prosecutions in which intent is the pivotal element of the crime charged and the only contested issue at trial. The opinion accepts the general principle that constitutionally erroneous jury instructions are not to be viewed in isolation but rather in the context of the charge as a whole, so that a reviewing court can assess the possible impact of the error on the deliberations of a reasonable juror. *Id.* at 315. See *Commonwealth* v. *Adrey*, 397 Mass. 751, 755 (1986); *Commonwealth* v. *Medina*, 380 Mass. 565, 577-580 (1980).

The Court repeated its language in *Sandstrom*, see note 2 *supra*, that general instructions as to the State's burden and the defendant's presumption of innocence do not dissipate the error in instructing the jury impermissibly as to burdens. *Id.* at 319. The Supreme Court then stated that "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity" because "[a] reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict" (footnote omitted). *Id.* at 322.[4] The Court held "that contradictory instructions as to intent — one of which imparts to the jury an unconstitutional understanding of the allocation of burdens of persuasion — create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner, unless other language in the charge *explains* the infirm language sufficiently to eliminate this possibility" (emphasis in original). *Id.* at 323 n.8.[5]

[4]We have reached the same result in cases in which instructions on reasonable doubt were conflicting. See, e.g., *Commonwealth* v. *Wood*, 380 Mass. 545, 548-550 (1980).

[5]In *Francis*, the impermissible instructions were "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted" and "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted." *Francis*, *supra* at 309. The second instruction was followed by an instruction that "[a] person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the

Francis determines that a reviewing court cannot have confidence in the propriety of a subsequent verdict of guilty unless some other portion of the charge not only contradicts the incorrect language but, through explanation, harmonizes it with the entire charge as well. *Francis* contemplates close scrutiny to determine whether language in the instructions not only corrects the erroneous language but also explains it.

2. *The standard of review.* Judicial holdings concerning impermissible burden-shifting language in instructions generally are applied retroactively. See *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977); *Dietz* v. *Solem*, 640 F.2d 126, 130 (8th Cir. 1981). Because *Francis* develops the method by which appellate courts should review and evaluate a *Sandstrom* error, its holding is fully retroactive. See *Commonwealth* v. *Breese*, 389 Mass. 540, 543-544 (1983). However, the Supreme Court also has ruled that, in cases involving burden-shifting instructions, States may "insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." *Hankerson, supra* at 244 n.8. See *Dietz, supra* at 132.

As a matter of State law, we have determined that we would not require lawyers to be clairvoyant and to object to instructions not yet identified as constitutional error. See *DeJoinville* v. *Commonwealth*, 381 Mass. 246, 248, 251 (1980); *Connolly* v. *Commonwealth*, 377 Mass. 527, 529-530 (1979); *Commonwealth* v. *Collins*, 374 Mass. 596, 599 (1978); *Commonwealth* v. *Stokes*, 374 Mass. 583, 588-591 (1978). We have said that, in cases in which erroneous malice aforethought instructions were given, we would review the instructions, being more tolerant in that review of instructions given before *Sandstrom*, and we would bring greater expectations and more careful scrutiny to malice instructions in cases which went to trial after the *Sandstrom* decision. See *Connolly, supra; Collins, supra; Stokes, supra*. Thus, while we did not insist on an objection, we followed a moderate approach in our analysis.

act for which the accused is prosecuted." *Id.* at 311-312. The Court concluded that the latter instruction was merely inconsistent with, and therefore inadequate to cure, the immediately preceding error. *Id.* at 322.

3. *The direct appeal.* Repoza's trial took place approximately one year before the *Sandstrom* decision. Pursuant to our policy to review such errors, on direct appeal and pursuant to G. L. c. 278, § 33E, we reviewed the instructions and determined that the instructions on malice indeed did violate the principles enunciated in *Sandstrom*. We determined, however, that "the judge's erroneous equating of malice implied or inferred to malice presumed was ultimately vitiated by his repeated and careful instructions reinforcing the principle that the burden of proof on every essential element of the crime invariably remains with the Commonwealth." See *Repoza I, supra* at 134. We concluded that the instructions did not require a new trial or the entry of a lesser degree of guilt.[6]

We recognized in *Repoza I, supra* at 132-133, that the malice instructions created an unconstitutional burden-shifting presumption on the issue of malice aforethought. No language in the rest of the charge explained these impermissible instructions sufficiently to ensure that a juror did not misunderstand the instructions or could not view them as burden-shifting. Language explaining the presumption of innocence and the Commonwealth's burden of proof, and stating that "[a]ll the presumptions of law independent of evidence are in favor of innocence," *Repoza I, supra* at 134, did not cure the possibility that, "[i]n light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of [stabbing the victim] and its ordinary consequences constituted proof of

[6]The defendant asserts that the failure to object to the instructions amounted to ineffective assistance of counsel. Because we had reviewed the instructions and concluded that they did not create a substantial likelihood of a miscarriage of justice, *Repoza I, supra* at 134-135 & n.8, there is no showing that "better work might have accomplished something material for the defense" (footnote omitted). *Commonwealth* v. *Satterfield*, 373 Mass. 109, 115 (1977). See *Commonwealth* v. *Saferian*, 366 Mass. 89, 96 (1974). Because *Sandstrom* had not been decided at the time of trial, an objection by counsel could not have been expected. As a result, we reviewed the instructions on appeal.

The defendant makes a number of other claims of ineffective assistance of counsel. Those claims either are without merit or without basis in the record.

intent beyond a reasonable doubt unless the defendant per suaded the jury otherwise." *Francis, supra* at 319. Clearly, the instructions at trial do not meet the requirements of *Francis*.

4. *Relief.* At Repoza's trial, the main contested issue was identification, not intent.[7] The jurors resolved the identification issue, finding beyond a reasonable doubt that the defendant was the individual who killed the victim. The jurors also clearly rejected a conviction of murder in the first degree. The error in the instructions which defined malice aforethought as an element of the crime of murder in the second degree admittedly was burden-shifting. The jurors may have rejected the conviction of murder in the second degree had the instructions on malice aforethought not been burden-shifting or had the impermissible instructions been "explained." Thus, the impermissible presumption language may have made a difference between a verdict of not guilty, guilty of murder in the second degree, or of manslaughter, a verdict which was consistent with the evidence and on which the judge instructed. We therefore reverse the order denying the defendant's motion and remand the matter to the Superior Court for a new trial.

So ordered.

[7] The dissent correctly notes that identification was the pivotal element at trial in the instant case. However, under G. L. c. 265, § 1, the degree of murder is for the jury. The higher degree of murder is based on the defendant's intent. Therefore, under our statute there is always an element of intent for the jury to determine in murder cases in which the defendant does not concede that a conviction of murder in the first or second degree would be warranted if the proper person were prosecuted. See, e.g., *Commonwealth* v. *Lee*, 383 Mass. 507, 512 (1981). At no point at either the trial or the direct appeal did the defendant concede that a murder, and not a manslaughter, had occurred. Thus, intent was a live issue and the error cannot be considered to be harmless beyond a reasonable doubt. Cf. *Commonwealth* v. *Shea*, 398 Mass. 264, 269-270 (1986); *Commonwealth* v. *Ely*, 388 Mass. 69, 74 (1983); *Commonwealth* v. *Tameleo*, 384 Mass. 368, 370 (1981).

It should be noted that the dissent does not disagree with the court's analysis of the *Francis* decision.

NOLAN, J. (dissenting). The unconstitutional instructions in this case were clearly harmless beyond a reasonable doubt because the defendant never contested the issue of malice. Identification was the only viable issue and despite the court's language to the contrary, the defendant all but conceded the fact that a murder was committed. Therefore, the erroneous language did not contribute to the defendant's conviction of murder in the second degree.

In *Commonwealth* v. *Lee*, 383 Mass. 507, 510-513 (1981), we recognized that the prejudicial effect of a *Sandstrom* violation is determined by the defense asserted at trial. Harmless error analysis was held to be particularly appropriate where the defendant does not dispute the Commonwealth's version of how the murder occurred, but only claims that he is not the murderer. *Id.* at 512. "In such circumstances, the failure to object to the charge as to malice cannot be attributed to inadvertence or lack of knowledge of evolving constitutional doctrine. Rather, the failure to object reflects a conscious choice of trial strategy by defense counsel." *Id.*

At trial, the defendant's attorney did not object to these instructions despite the fact that the prosecutor alerted the judge to the erroneous language. Nor did defense counsel seek review of these instructions on appeal the first time around. The most plausible explanation for these decisions is that counsel realized that the "evidence here raised no issue of justification, mitigation, or lack of intent on the part of the perpetrator." *Id.* at 513.

Therefore, I dissent.

COMMONWEALTH vs. RICHARD REPOZA.

Middlesex. September 9, 1980. — December 15, 1980.

Present: HENNESSEY, C.J., QUIRICO, WILKINS, LIACOS, & ABRAMS, JJ.

Practice, Criminal, Capital case, Instructions to jury, Presumptions and burden of proof. *Evidence,* Cross-examination, Judicial discretion, Relevancy and materiality, Photograph, Identification. *Homicide. Malice.*

At a criminal trial, the judge did not err in excluding further inquiry into the substance of a conversation between a witness and the prosecutor during a recess in the trial after the defendant had been permitted to establish that the prosecutor had refreshed the witness's memory as to certain events but that the witness had not been instructed as to how to testify. [125-126]

At the trial of a defendant charged with murder after he allegedly stabbed the victim during a brawl between two groups of young people, the judge did not abuse his discretion in admitting in evidence a lead-weighted leather glove which was found in the course of a police search of the vicinity of the brawl on the night of the crime and which allegedly had been carried by one of the defendant's friends. [126-128]

At the trial of a defendant charged with murder after he allegedly stabbed the victim during a brawl between two groups of young people, the judge did not abuse his discretion in admitting photographs of the location where the victim had fallen which depicted unmistakable bloodstains on the sidewalk, inasmuch as the precise location of the victim at the time of the stabbing was a critical element of both the defendant's and the Commonwealth's case. [128-129]

At a murder trial, the judge did not err in permitting a police officer to testify as to a witness's prior extrajudicial identification of the defendant to corroborate the witness's in-court identification. [129-130]

At a criminal trial, the judge's instructions with respect to the evidentiary effect of a negative answer to a leading question were not, taken in their entirety, erroneous. [131]

At a murder trial, the judge's erroneous instructions with respect to a presumption of malice arising from the intentional use of a deadly weapon did not require reversal of the defendant's conviction where the instructions were otherwise clear and correct as to the Commonwealth's burden of proof and left no doubt that the jury could

return a verdict of murder only of they were satisfied of the existence of malice beyond a reasonable doubt. [132-135]

INDICTMENT found and returned in the Superior Court Department on July 11, 1978.

The case was tried before *Tamburello*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Paul P. Caradonna for the defendant.

Kevin C. McLean, Assistant District Attorney, for the Commonwealth.

QUIRICO, J. In the early morning of June 10, 1978, during the violent aftermath of a high school graduation party, John P. Grogan died of a knife wound to his heart. The defendant, Richard Repoza, was apprehended at the scene, was indicted by a grand jury for murder in the first degree, and, on November 2, 1978, following a nine-day jury trial, was found guilty of Grogan's murder in the second degree. On this appeal pursuant to G. L. c. 278, §§ 33A-33G, the defendant assigns a number of errors allegedly committed by the trial judge during the course of the trial, and in addition seeks to invoke the power of extraordinary review given this court by the provisions of G. L. c. 278, § 33E.[1] Neither our review of the defendant's specific assignments of error nor our independent review of the record reveals any error requiring reversal of the defendant's conviction or the entry of a verdict of a lesser degree of guilt.

Although a number of questions regarding Grogan's death remain unresolved or disputed, the outline of the

[1] Prior to July 1, 1979, G. L. c. 278, § 33E, provided for a full review by this court of any case tried on an indictment for murder in the first degree, and resulting in a conviction for murder in the second degree. By St. 1979, c. 346, § 2, the statute was amended to provide for special review only of cases in which the indictment leads to a conviction for murder in the first degree. This case, however, falls within the category of cases in which the offense resulting in the conviction was committed prior to July 1, 1979, and which thus remained eligible for our review under the rule announced in *Commonwealth* v. *Davis*, 380 Mass. 1, 12-17 (1980).

events preceding the killing is relatively clear. On the evening of June 9, 1978, Carlos Vargas hosted a party at his home at 8 Hammond Street, Somerville, to celebrate his graduation from Somerville Technical Trade High School. In addition to his school friends, Vargas invited to the party his steady girl friend, a resident of East Cambridge, and suggested that she invite others. Most of Vargas' guests arrived at about 8 P.M. Somewhat later, a group of about eight Cambridge youths, all of whom learned of the party through Vargas' girl friend, arrived at the Vargas house. About 8:30 P.M., the defendant and a friend, John Cavallaro, both of whom were from Cambridge and friendly with the other Cambridge guests, arrived. In all the party was attended by about fifteen boys from Somerville, six from Cambridge, and a total of sixteen to twenty girls in approximately equal numbers from each city.

The party continued without incident until about midnight. The defendant was "hanging around," dancing, talking, and perhaps watching television, and he caused no trouble. Carlos Vargas had not asked him or any of the Cambridge group to leave.

About midnight, Robert Devereaux of Somerville and Joseph Long of Cambridge became involved in a scuffle in the Vargas dining room. Devereaux thought that Long was bothering some of the girls at the party and tried to stop him. Zenalia Vargas, Carlos' mother, separated the two, and told the crowd that the party was over; she went to the cellar and removed an electrical fuse, thus stopping the music and ending the party. The Vargas house emptied almost immediately into Hammond Street. Carlos Vargas told the group to move away from his house and everyone moved northerly along Hammond Street and turned easterly onto Concord Avenue. Near the intersection of Concord Avenue and Hammond Street, Long and Devereaux resumed their fight, now surrounded by a crowd.

As is perhaps to be expected, the testimony describing the events which followed is somewhat conflicting. The Commonwealth produced four witnesses who testified that the

defendant was at the scene of this fight with the knife later identified as the murder weapon. The first of these witnesses was Carlos Vargas. As he watched the fight, Repoza approached him with a knife in his hand, and, standing at about arm's length, said, "No, this is your party," or, "This is your party." As Vargas backed away, he was seized from behind by Francis Kelley, the first police officer at the scene, and the two began to grapple.

By the time Vargas had been subdued, Grogan had been stabbed. According to Officer Kelley, there was general fighting when he arrived on Concord Avenue. At some point after he arrived, the fight between Long and Devereaux broke up. Long retreated to the stairs of a three-story house diagonally across Concord Avenue from Hammond Street. Also on or near the stairs were the defendant, Robert Devereaux, Richard Trevisone, James Poplawski, and two girls from Cambridge. Both Devereaux and Long testified that while they were on the stairs, Devereaux kicked Long in the face; Long was knocked down from the stairs, and disappeared into the crowd, from which he emerged semi-conscious some moments later.

Three witnesses testified to seeing Repoza at the stairs holding a knife. Trevisone testified that while on the stairs, Repoza was holding a knife exposed in his hand. After telling Repoza three times to drop it, Trevisone grabbed him by the left hand and the neck and dragged him into the street. Repoza switched the knife from one hand to the other and offered to fight Trevisone. At this point, Poplawski attempted to intervene, but was struck by Long with a picket torn from a nearby fence. The victim, John Grogan, was also seen fighting in the immediate area. When Poplawski was struck, Repoza and Long, pursued by Poplawski and Trevisone, ran westerly down Concord Avenue toward Beacon Street. Ahead of them, running in the same direction, Grogan was pursuing two other unidentified persons. Trevisone saw Grogan stop, turn around, and punch the person he had chased. With Trevisone some twelve feet behind him, the defendant ran toward Grogan and, drawing

abreast of him, struck him once in the left side of the chest with the knife. Repoza then continued his flight. Trevisone stopped momentarily, then resumed his pursuit of Repoza. Near the corner of Beacon Street and Concord Avenue, Trevisone overtook Repoza, and delivered three kicks, one to Repoza's stomach and two to his groin. Trevisone was then jumped from behind and lost the defendant. Seeing a police car turn onto Concord Avenue in front of him, Trevisone ran back to the Vargas house, but after a minute he returned to where Grogan was lying. Trevisone approached one of the police officers present and said, "You have to get him," or, "You can get him." Then, accompanied by an officer, Trevisone walked toward Hammond Street. The defendant was at this time handcuffed and sitting in the back seat of a police cruiser; on seeing him Trevisone immediately identified him as Grogan's assailant.

Trevisone was the only witness who testified that he saw the defendant stab Grogan. Significant details of his testimony, however, were corroborated by other witnesses. Poplawski saw Repoza with a knife on the porch of the house on Concord Avenue, and participated in the ensuing chase. He saw Grogan cross onto the sidewalk of Concord Avenue. Poplawski caught Long, knocked him down and kicked him. Looking up, he saw Trevisone, Repoza, and Grogan close together on Concord Avenue; he then saw Repoza "punch" Grogan in the upper chest, and watched Grogan stumble toward him bleeding. Poplawski chased Repoza around the corner of Beacon Street, and saw him throw something to his right near the corner. Poplawski caught Repoza on Beacon Street, where both were "grabbed" by Officer Robert F. Hodnett. Thinking that Repoza might escape, Poplawski said to Hodnett, "Grab him. He is the one who stabbed him." Officer Hodnett escorted both youths back to Concord Avenue and placed them in patrol cars; Poplawski subsequently made a second identification of Repoza.

Officer Michael F. Gaughan and Detective Philip J. Oteri were also at the scene of the fight. Gaughan escorted

Trevisone to the cruiser in which Repoza had been placed; both he and Oteri testified that Trevisone positively identified Repoza at that time. Oteri found the knife later identified as the murder weapon in a place consistent with Poplawski's description of where it had been thrown by Repoza. Finally, the Commonwealth presented a resident of Concord Avenue, who, awakened by the noise of the fight, looked out her window in time to see a group of about six persons leave the main group and run toward her house. As they passed her house, Grogan seized his chest, staggered, and fell, bleeding.[2]

Repoza did not testify in his own behalf. Two girls from the Cambridge group testified that they were with Repoza immediately after the Long-Devereaux fight, and that they saw no knife. There was also testimony by these two Cambridge girls that, following his fight with Long, Devereaux threatened them with a knife. A number of other defense witnesses testified to details of the brawl, which, if believed, might have cast doubt on the account given by the Commonwealth's witnesses. None, however, significantly undermined the central eye-witness testimony given by Trevisone and Poplawski.

1. *Evidentiary rulings.* Initially, the defendant assigns as error four evidentiary rulings made by the trial judge. These include certain limitations on the defendant's cross-examination of Trevisone, the admission in evidence of a weighted glove found at the scene of the crime, the admission of numerous photographs of the scene, and the admis-

[2]The Commonwealth also placed John Cavallaro on the stand. Cavallaro was from Cambridge and had arrived at the party with the defendant. He was the only member of the Cambridge group to testify for the Commonwealth. On direct examination, Cavallaro's testimony largely corroborated the account of events given by Trevisone and Poplawski. He was, however, a sufficiently difficult witness that the judge allowed the Commonwealth to use leading questions during direct examination. Under cross-examination, Cavallaro stated that he saw the victim emerge from a "pile" of people on the ground, then stagger and fall. Because Cavallaro's testimony was not essential to the Commonwealth's case, and because there was ample reason for the jury to disregard it, we do not dwell on it here.

sion of certain testimony from Detective Oteri as to Trevisone's on-the-scene identification of the defendant. We discuss these points seriatim; in none do we find any error.

a. *Scope of cross-examination.* Defense counsel by cross-examination sought to develop certain inconsistencies between Trevisone's description at the trial of the stabbing and a physical demonstration of the incident given by Trevisone at the earlier probable cause hearing. The Commonwealth objected on the ground that the transcript of the probable cause hearing did not adequately reflect the details of the earlier demonstration. After repeated attempts at clarification, including two bench conferences, the court took a twenty-four minute recess. Immediately following the recess, defense counsel elicited from Trevisone the information that, during the recess, he had met with the prosecutor in the prosecutor's office, that they had discussed the case, and that the prosecutor had refreshed his memory. Trevisone further testified that he had not been told what to say. At that point, the judge excluded further inquiry into the substance of the conversation.

The accused in a criminal case is, of course, guaranteed the right to reasonable cross-examination of the State's witnesses. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). *Commonwealth* v. *Dougan*, 377 Mass. 303, 310 (1979). Equally well settled, however, is the principle that "the scope of cross-examination, including to what extent the accuracy, veracity, and credibility of a witness may be tested, rests largely in the sound discretion of the judge, not subject to revision unless prejudice is shown to a party by reason of too narrow restriction or too great breadth of inquiry." *Commonwealth* v. *Smith*, 329 Mass. 477, 479 (1952). *Commonwealth* v. *Underwood*, 358 Mass. 506, 513 (1970). The burden of showing an abuse of discretion and resulting prejudice is on the defendant, and our determination must be made by considering the cross-examination in its entirety. *Commonwealth* v. *Hall*, 369 Mass. 715, 731 (1976). On this record, there is no sign of prejudice. The defendant was allowed to establish that Trevisone had had his memory

refreshed and that he had not been instructed as to how to testify. Significantly, defense counsel was ultimately successful in his attempt to show that Trevisone was unsure as to how the defendant was holding the knife when the fatal blow was struck. At most, this was an instance in which "the judge's ruling 'did not totally exclude cross-examination . . . [about the witness's conversation with the prosecutor], but only limited additional questions on that subject once it had already been raised and explored to some extent before the jury.'" *Commonwealth* v. *Smallwood*, 379 Mass. 878, 889 (1980), quoting from *Commonwealth* v. *Watson*, 377 Mass. 814, 837 (1979). It is clear that such a ruling is within the province of the trial judge absent a particularized showing of prejudice wholly lacking here. *Commonwealth* v. *Hall*, *supra*. See *Commonwealth* v. *Valliere*, 366 Mass. 479, 492 (1974) (no error in excluding question as to why police detective had interfered in discussion between defense counsel and prosecution witness in corridor outside court room during a break in trial).

b. *Admissibility of "sap glove."* The defendant next challenges the admission in evidence of a lead-weighted leather glove, or "sap glove," found in the course of a police search of Concord Avenue on the night of the crime. This weapon played a relatively minor part in the Commonwealth's case. It was first mentioned on the second day of trial during the testimony of Carlos Vargas. Defense counsel had, during an extended cross-examination of Vargas, inquired broadly into the circumstances surrounding the Long-Devereaux fight. On redirect examination, the judge allowed Vargas to testify over the defendant's objection that he had seen someone other than the defendant at the scene of the fight with something "they could use for hitting people." Defense counsel then elicited from Vargas testimony that he had seen Kenneth Belski, of Cambridge, with a weapon at the scene of the fight. Finally, on further redirect examination, Vargas was allowed to testify that he had seen Belski with a sap glove. The glove itself was allowed in evidence when Officer Hodnett identified it as

having been found during his search of Concord Avenue shortly after the stabbing. On the sixth day of trial, Detective Oteri testified without objection as to the use of sap gloves. On the seventh day of trial, the defendant called Belski to the witness stand, and on cross-examination the prosecutor elicited his denial that he had been armed with the sap glove on the night of the crime.

The defendant now claims that admission of the sap glove was prejudicial in that it may have given rise to an inference that persons associated with him were armed and predisposed to cause trouble when they arrived at Vargas' party. That it appears in retrospect that an inference harmful to the defendant may have been drawn from this evidence is not, without more, a ground for appeal. In a recent and similar case involving a homicide which occurred in the course of a violent clash between two opposing groups, this court had occasion to emphasize the breadth of a trial judge's discretion in admitting penumbral evidence of events preceding the homicide. *Commonwealth* v. *Alicea*, 376 Mass. 506, 522 (1978). Articles discovered at or near the scene of a crime have consistently been held admissible by this court where they tend to shed light on the setting in which the crime occurred. *Commonwealth* v. *Murphy*, 356 Mass. 604, 610 (1970). *Commonwealth* v. *Wallace*, 326 Mass. 393, 395-396 (1950). *Commonwealth* v. *Giacomazza*, 311 Mass. 456, 470 (1942). *Commonwealth* v. *Russ*, 232 Mass. 58, 79 (1919). *Commonwealth* v. *Retkovitz*, 222 Mass. 245, 249 (1915).

In this case, both the Commonwealth and the defendant presented detailed evidence of the circumstances preceding John Grogan's death. Defense counsel claimed, and was allowed, broad latitude in presenting evidence "incidental to the total concept of what happened that night." This court will not disturb a trial judge's discretionary ruling where, as here, the defendant seems to have been "as much interested in developing [the disputed material] as the prosecution." *Commonwealth* v. *Alicea*, *supra*. Cf. *Commonwealth* v.

Williams, 379 Mass. 600, 605-606 (1980); *Commonwealth* v. *Gouveia*, 371 Mass. 566, 570 (1976).[3]

c. *Photographic evidence.* The Commonwealth introduced as exhibits fifteen photographs, twelve of them in color, all taken on the day of Grogan's death. A number of these depict unmistakable bloodstains on the sidewalk and the travelled surface of Concord Avenue at the location where the victim fell after being stabbed. The defendant objects generally to their admission, claiming that they were highly inflammatory and possessed only cumulative evidentiary value, as the jury had taken an extensive view of Concord Avenue early in the trial.

There was no error in admitting these photographs. It is axiomatic that the admissibility of photographic evidence is committed to the sound discretion of the trial judge, limited only in those rare instances in which the probative value of the evidence is overwhelmed by its inflammatory potential. *Commonwealth* v. *Cobb*, 379 Mass. 456, 468-469 (1980). *Commonwealth* v. *Amazeen*, 375 Mass. 73, 84 (1978). *Commonwealth* v. *Bys*, 370 Mass. 350, 360-361 (1976). The precise location of the victim at the time of the stabbing was a critical element of the defendant's, as well as the Commonwealth's, case. The judge carefully instructed the jury prior

[3]The defendant further argues that the prosecutor in closing argument improperly intimated that the sap glove belonged to the defendant. In closing argument, the prosecutor referred to the glove and said "Where did this come from? Young Belski never saw [it] before. But who said he threw it away? Who saw him throw it away? Who does this glove fit? I suggest to you, try it on when you get out into the jury room. They were ready, and [the defendant] was ready to use that knife that night going up the street." Although this passage is not without its ambiguities, read in the context of the conflicting testimony as to possession of the glove, it appears to be directed to the fact that other members of the Cambridge group were armed at the party. Carlos Vargas, of course, testified to this fact at trial. Particularly where the defendant failed to object to the challenged statement during the closing argument, and requested no limiting instruction as to inferences to be drawn from the discovery of the sap glove at the scene of the killing, the quoted passage presents no basis for reversal. *Commonwealth* v. *Earltop*, 372 Mass. 199, 203-204 (1977).

to admitting the first photograph that it was admitted for the sole purpose of showing the location of the victim's body and not to show the presence of bloodstains. Similar instructions were repeated on at least three occasions as other photographs were admitted. We recognize that, in the final analysis, any amount of limiting instruction may be insufficient to overcome the commonsense observation of a jury that a stab wound to the heart will cause considerable bleeding. But where the allegedly inflammatory element of a photograph offered as evidence is a natural and inevitable incident of the crime, and the photograph is otherwise probative, there is little basis to disturb the ruling of a trial judge as to its admissibility. Compare *Commonwealth* v. *Cobb*, *supra*, with *Commonwealth* v. *Allen*, 377 Mass. 674, 678-680 (1979); and *Commonwealth* v. *Richmond*, 371 Mass. 563 (1976).[4]

d. *Admissibility of testimony as to extrajudicial identification.* Philip Oteri, a detective for the Somerville police department, was allowed at trial to testify that shortly after Grogan was stabbed, Trevisone was escorted to the police cruiser in which Repoza was sitting, at which point Trevisone stated, "That's him. That's the one who stabbed John." The defendant, in his final evidentiary point, argues that this testimony was inadmissible hearsay.

The hearsay rule renders extrajudicial statements inadmissible only if they are offered to prove the truth of the matters asserted in the statement. W.B. Leach & P.J. Liacos, Massachusetts Evidence 183 (4th ed. 1967). Before Oteri testified, Trevisone had, from the witness stand, identified the defendant as the person who stabbed Grogan, and had further testified that when he observed Repoza in a

[4]In closing argument, defense counsel drew the jury's attention to the nature of the victim's wound — "through the ventricle, the pumping chamber of the heart, spurts it right out" — in an attempt to demonstrate that the wound was inconsistent with the Commonwealth's account of the circumstances surrounding the stabbing. Without questioning the effectiveness of this argument, we note that it underscores the futility of trying to keep from the jury in a case such as this the gruesome nature of the victim's wounds.

police cruiser on the night of the crime, he had stated to Officers Gaughan and Oteri, "That's him." Oteri's testimony was thus admissible under the rule allowing testimony as to prior extrajudicial identifications to be introduced to corroborate an in-court identification. *Commonwealth* v. *Sheeran*, 370 Mass. 82, 87 (1976). *Commonwealth* v. *Swenson*, 368 Mass. 268, 273 (1975). *Commonwealth* v. *Leaster*, 362 Mass. 407, 411-412 (1972). See *Commonwealth* v. *Redmond*, 357 Mass. 333, 341 (1970). In these circumstances, the testimony is admitted "not for the truth of the matter asserted, but to corroborate the fact of prior identification." *Commonwealth* v. *Sheeran*, *supra*.[5] Although a limiting instruction as to the effect of such testimony is preferable, *Commonwealth* v. *Leaster*, *supra* at 412, such an instruction is not mandatory where, as here, the jury would naturally view the testimony as merely corroborative.[6] *Commonwealth* v. *Denault*, 362 Mass. 564, 567 (1972).

2. *Instructions to the jury.* Two points arising from the trial remain for discussion. Both have to do with the judge's instructions to the jury. The first is raised by the defendant in his brief; the second we discuss in accordance with our obligation under G. L. c. 278, § 33E, to review the record in this case to determine whether justice may require a new trial or the entry of a verdict of a lesser degree of guilt.

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[5]We note that the use in evidence of an extrajudicial identification is not limited to corroboration. Such an identification may also be offered (a) for the purpose of impeachment and (b) as substantive evidence of the identification, where the witness is available in court to testify, but is either unable or unwilling to make an in-court identification. See *Commonwealth* v. *Vitello*, 376 Mass. 426, 459-461 (1978), and authorities cited.

[6]The corroborative nature of Detective Oteri's testimony must have been particularly obvious to the jury in this case. Two prosecution witnesses, Trevisone and Poplawski, identified the defendant as Grogan's assailant. On the fourth day of trial, two days prior to Oteri's appearance, Officer Gaughan testified without objection to Trevisone's on-the-scene identification of the defendant. His testimony was substantially identical to that challenged here. In addition, a third police officer, Hodnett, testified to an extrajudicial identification of the defendant made by Poplawski, again without defense objection and prior to Oteri's appearance.

a. *Instructions on leading questions.* The defendant asserts that the judge erred in his instructions to the jury with regard to the evidentiary effect of a negative answer to a leading question. The instruction to which the defendant particularly objects occurred on the second day of trial. During his cross-examination of Trevisone, defense counsel asked, "Do you recall Richard Repoza jumping into the [Long-Devereaux] fight, trying to break it up?" to which Trevisone answered, "No." The judge then instructed the jury as follows: "Now, I am going to say to the jury, when the answer is 'no' to a question, you are not to take the body of the question as evidence, or to wonder or speculate if it was evidence. If the evidence [*sic*] is 'No', you are to disregard entirely the contents of the question, unless and until it is proved by somebody else at a later time. If somebody asked me, 'Judge, were you in New York last night?' and I said, 'No,' you are not to wonder if I was in New York. It just is not any evidence at all."

Defense counsel than thanked the judge and continued his cross-examination. On two other occasions during the trial, the judge again instructed the jury that the contents of a leading question are not evidence and must be disregarded unless and until they are properly proved. No objection was made nor exception saved by defense counsel when any of these rulings was made. See Mass. R. Crim. P. 22, 378 Mass. 892 (1979).

On this appeal, it is argued that the final two sentences of the quoted instruction were misleading in that the example cited by the judge would at least produce evidence that the person answering was not in New York on the night in question. We disagree. Read in their totality, the judge's instructions on this point were such that no reasonable juror could have been misled by them. Cf. *Commonwealth* v. *Medina*, 380 Mass. 565, 577 (1980). Since this issue was not raised at trial, either by objection or by a request for clarifying instructions, our reviewing function is limited indeed. See *Commonwealth* v. *Walden*, 380 Mass. 724, 731 (1980). In this instance, however, no review, whether limited or plenary, would lead to a different conclusion.

b. *Instruction on malice.* While we find no error in any of the points argued by the defendant, the provisions of G. L. c. 278, § 33E, bring the "whole case" here for consideration of both law and evidence. We therefore discuss one further point.

In his charge to the jury on the element of malice required to support a murder conviction, the judge spoke twice of a "presumption" of malice arising from the intentional use of a deadly weapon in a homicide.[7] This was incorrect.

While the element of malice aforethought necessary to elevate homicide to murder may be inferred from the intentional use of a deadly weapon, *Commonwealth* v. *Campbell*, 375 Mass. 308, 312-313 (1978), it is constitutionally required that the Commonwealth prove every essential element of a crime beyond a reasonable doubt. *Commonwealth* v. *Callahan*, 380 Mass. 821, 825 (1980), and cases cited. Well before the trial in this case, this court had made clear the impropriety

[7] In his instructions to the jury at the close of trial, the judge explained the concept of malice aforethought in the following terms: "So what is malice as used in the words: malice aforethought? Well, it is of two kinds. It is active malice, which we all understand by the simple use of the words in this meaning: an active malice is ill will towards someone. It is the active hatred of someone. It is a grudge or an ill feeling toward someone, harboring an attempt to hurt someone, or act of bad blood or feeling, generating motives of revenge or punishment. That is active malice. But you are not looking for active malice alone. You are looking for an unlawful, unjustified act with no extenuating circumstances, and the wrongfulness of the act itself is sufficient to sustain a finding of malice so far as the law is concerned.

"That is perhaps malice implied in law as distinct from malice that you find from the conduct of people. *And when a killing is caused by the intentional use of a deadly weapon, there arises the presumption of malice aforethought.* Because, as that term has long been understood and applied in this Commonwealth, the use of a deadly weapon, itself capable of causing harm and death, if an unjustified act with no extenuation or excuse, is sufficient itself to supply the element of malice you are looking for in determining whether a crime is murder or less than murder.

"However, *the circumstances which attend to killing may be shown to rebut the presumption* by showing circumstances which, although they do not excuse the killing, might mitigate it from the crime of murder to manslaughter. And this I will discuss for you when I define manslaughter." (Emphasis supplied.)

inherent in the use of language which might suggest to a jury that any element of a crime may be presumed, or that the burden of rebutting the Commonwealth's case ever shifts to or rests on the defendant. *Commonwealth* v. *Collins*, 374 Mass. 596, 600 n.2 (1978). *Commonwealth* v. *Rodriguez*, 370 Mass. 684 (1976). Moreover, we had announced our intention to scrutinize carefully cases decided after *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), for the constitutional adequacy of the instructions given to the jury regarding the Commonwealth's burden of proof. *Commonwealth* v. *Collins*, *supra* at 599.

Several recent cases further articulate the nature of the scrutiny alluded to in *Collins*. In *Commonwealth* v. *Callahan*, *supra*, we reversed a conviction of murder in the first degree based on our conclusion that, in that case, the judge's instructions as to a "presumption" of malice arising from proof of the defendant's intentional use of a deadly weapon had created the substantial risk of a miscarriage of justice. *Id.* at 822. The jury charge in that case was defective in two respects. First, after instructing the jury that the legal effect of a presumption is to require that a certain conclusion be drawn from facts proved, the judge used language of presumption six times in explaining to the jury the effect of the Commonwealth's proof of the use of a deadly weapon. We held that the charge to the jury in that case, taken as a whole, clearly stated that unless the defendant had introduced some evidence negating malice, the jury were required to find malice from proof that the defendant intentionally used a deadly weapon to cause the victim's death. *Id.* at 824-825. The language of that charge, we held, clearly reflected an unconstitutional shifting of the burden of proof to the defendant to disprove malice. *Id.* at 824-825.

The second and equally grave defect in the *Callahan* charge involved the judge's reference to the "'plain and obvious principle that a person must be presumed to intend'" the natural, probable, and usual consequences of his voluntary acts. *Id.* at 823. Notwithstanding the small difference between the use of "must" and "may," we held that the use

of "must" in this context is reversible error when it could reasonably be interpreted, in light of the entire charge, to relieve the Commonwealth of any part of its burden of proof. *Id.* at 825.

The decision in *Callahan* exemplifies our rejection of an approach either narrow or mechanistic in our consideration of the issue raised in the present case. Cf. *Commonwealth* v. *Collins*, *supra*. In each case, the question "'whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction' . . . and . . . error is avoided if the charge, read as a whole, makes clear the Commonwealth's burden." *Commonwealth* v. *Medina*, *supra* at 578, quoting from *Sandstrom* v. *Montana*, 442 U.S. 510, 514 (1979). Here, as in *Medina*, the judge's erroneous equating of malice implied or inferred to malice presumed was ultimately vitiated by his repeated and careful instructions reinforcing the principle that the burden of proof on every essential element of the crime invariably remains with the Commonwealth. The judge began his instructions by explaining the presumption of innocence, stating clearly that the defendant "need not present evidence of his innocence, but may rest inactive and secure until the Commonwealth goes forward with evidence and proves him guilty." The charge went on at some length to state that every essential element of the crime must be proved by the Commonwealth beyond a reasonable doubt. The judge explicitly stated that "[a]ll the presumptions of law independent of evidence are in favor of innocence." The presentation of the nature and effect of permissible inferences was thoughtful and detailed. Finally, we think that the instructions on the nature of malice aforethought, which came after the judge's erroneous use of the word "presumption," were sufficient to dispel any misconception that might have been created by the error. These instructions left no doubt that the jury could return a verdict of murder only if they were satisfied of the existence of malice beyond a reasonable doubt.

In *Commonwealth* v. *Medina*, *supra* at 577-578, we found no error requiring reversal in a charge which made a single reference to a "presumption" of malice, but which was otherwise clear and correct as to the Commonwealth's burden of proof. Again, in *Commonwealth* v. *Fitzgerald*, 380 Mass. 840, 844-846 (1980), we upheld instructions substantially identical to those given here. Here, as in *Fitzgerald*, we are convinced that, read as a whole, the judge's instructions indicated that the jury "were required to find malice in order to convict of murder; [they] did not imply that the jury had to find an absence of malice in order to acquit of murder." *Id.* at 845.[8]

3. *Further § 33E considerations.* We reach finally the question whether the verdict in this case was supported by

[8] Although our decision in this case does not rest upon the failure of defense counsel to except to the incorrect instruction, it is well to note that trial counsel share with the judiciary the responsibility for ensuring that juries are properly instructed as to the Commonwealth's burden of proving a crime. *Commonwealth* v. *Fitzgerald*, 380 Mass. 840, 842 n.2 (1980). *Commonwealth* v. *Medina*, 380 Mass. 565, 577 n.5 (1980). A bench conference immediately following the instructions in the instant case reveals that both the defense counsel and the judge were under a misapprehension as to the effect of proof of the intentional use of a deadly weapon in the commission of a homicide. The prosecutor correctly and appropriately brought to the judge's attention the critical distinction between inferences and presumption in the following colloquy:

THE PROSECUTOR: "The only thing I was interested in was that you tell the jury that malice may be inferred when the killing is the result of an intentional use of deadly force."

THE JUDGE: "I covered that, too. When the killing is caused by the intentional use of a deadly weapon there arises a presumption of malice aforethought."

DEFENDANT'S COUNSEL: "Right."

The prosecutor twice again sought to alert the judge to the error before acquiescing in the instruction as given. We note also that included in the defendant's requested instructions on the elements of murder in the second degree was the following: "Every sane person is presumed to intend the natural and probable consequences of his acts. However, a specific intent is required as an element of the crime charged, so no inference of such intent may be drawn from the mere proof of the act." The requested instruction would be needlessly confusing to a jury. Our recent decisions in this area offer sufficient guidance to allow the formulation of clear and precise instructions on the inference which may permissibly be drawn from the intentional use of a deadly weapon in cases of homicide.

the weight of the evidence and consonant with justice. As to the first point, the Commonwealth clearly produced evidence sufficient to support a finding of murder in the second degree. Four witnesses testified that Repoza was at the scene of the killing armed with a knife. Zenalia Vargas, Carlos Vargas' mother, testified that the knife found near the scene of the crime, and identified as the one in the defendant's possession, did not come from her house. The clear inference from her testimony is that Repoza arrived at the party armed. Carlos Vargas testified that the defendant approached him with the knife, then said, "No, this is your party"; from this exchange, the jury could have inferred that the defendant was willing to use the knife offensively, and not merely defensively, once the trouble started. Both Trevisone and Poplawski gave eyewitness accounts of the stabbing. Poplawski's testimony on cross-examination was particularly damaging. He stated that after the incident on the stairs, Repoza fled down the travelled surface of Concord Avenue while Grogan ran on the sidewalk. From this testimony, the jury could have concluded that John Grogan did not stand in the defendant's natural route of escape, but that Repoza rather deviated from the shortest course to safety to strike the fatal blow.

Having considered this case as to the law and the evidence as we are required to do under G. L. c. 278, § 33E, we decline to grant the defendant a new trial or to direct the entry of a verdict of a lesser degree of guilt than that found by the jury.

Judgment affirmed.